For the above reasons and on the undertaking by the plaintiff as to damages, I dismiss the application of the defendant and order that the injunction granted on 30 December 1991 restraining the defendant, be continued until after the trial of this action or until further order. The costs of the application be costs in the cause.

Before leaving the matter, I would make clear that for the purpose of this application, I gave no consideration to the plaintiff's letter marked "Without Prejudice" and dated 7 August 1991, the admissibility in evidence of which the defendant objected to, though some arguments were advanced by both parties on the point.

RE: KHO KAK SIEW
EX-PARTE: MUI BANK BHD.

HIGH COURT, KUCHING
TUAN HAIDAR BIN MOHD NOOR J.
[BANKRUPTCY NO. 468 OF 1989]
9 OCTOBER 1992

BANKRUPTCY: Application to annul and rescind receiving and adjudication orders - Whether application should be allowed.

The debtor was adjudged a bankrupt by consent. The debtor subsequently applied to annul and rescind the receiving and adjudication order on the grounds that:

(1) The debtor ought not to have been adjudged a bankrupt while the creditor was actively pursuing the foreclosure action.
(2) The creditor, being a secured creditor, had failed to specify in their petition their willingness to give up the security in the event the debtor is adjudged a bankrupt or give an estimate of the security as required by s. 5(2) of the Bankruptcy Act 1967.
(3) The interest on the judgement sum carried interest at the rate of 15% per annum contrary to O.42 r. 12, Rules of the High Court 1980.

Held:

[1] It is not improper to commence a foreclosure action and at the same time enforce a guarantee.

[2] A secured creditor refers to a person holding a charge on the property of the debtor as a security for a debt due to him from the debtor. The debtor not being the person who provided the security is outside the purview of s. 5(2) read with s. 2 of the Act and the question of the creditor's action violating s. 5(2) of the Act does not arise at all.

[3] The interest charged was in accordance to the judgment obtained and there had been no appeal in respect of the said judgment. The debtor had not given notice to the creditor under s. 3(2)(ii) of the Act and it was too late for the debtor to raise the issue now.

[*Debtor's application dismissed with costs*].

Cases referred to:

Bank Bumiputra Malaysia Bhd. v. Esah [1985] 2 CLJ 409 ***(foll)***

Rabindera Singh s/o Arjan Singh ex-parte Malaysian International Merchant Bankers Bhd. [1989] CLJ 858 ***(refd)***
In re Perkins Ex-parte Mexican Santa Barbara Mining Co. [1890] QB 613 ***(refd)***
Re Arunachalam ex-parte Indian Overseas Bank Ltd. [1968] 1 MLJ at p. 90 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 2, 3(2)(ii), 5(2), 105
Rules of the High Court 1980, O. 42 r. 12

Other sources referred to:
Halsbury's Laws of England, 2nd Edn., Vol. 2, p. 64

For the creditor - John Lim; M/s. Tiong, Lim, Wong & Co.
For the debtor - Matthew Chan; M/s. Matthew T.K. Chan & Co.
For the official assignee - M. Suhaibudden, Assistant Official Assignee

JUDGMENT

Haidar Bin Mohd. Noor J:
The debtor, Kho Kak Siew filed a notice of motion on 21 October 1991 (encl. 14) for an order that the receiving and adjudication order to take effect three months from 22 February 1991 be annulled and rescinded under and subject to the provisions of s. 105 of the Bankruptcy Act 1967 ("the Act"). The receiving and adjudication order was made with the consent of the debtor who was represented by Mr. Stanley Eddy. An affidavit in support of the motion was filed by the debtor. The creditor through its manager, Goh Lam Hua, opposed the motion by filing an affidavit in opposition on 17 January 1992 (encl. 25). The debtor further filed supplementary affidavits dated 5 November 1991 and 24 March 1992 and a corrective affidavit on 8 April 1992.

In the affidavits in support of the motion, the debtor (bankrupt), it would appear, is relying on two grounds, namely -

(1) The debtor ought not to have been adjudged a bankrupt while the creditor is actively pursuing the foreclosure action.
(2) The creditor is a secured creditor and had failed to specify in the petition their willingness to give up the security in the event the debtor is adjudged a bankrupt or give an estimate of the security as required by s. 5 (2) of the Bankruptcy Act 1967.

In addition thereto, by the submission of Mr. Matthew Chan, Counsel for the debtor, an additional ground was also relied on, that is, the interest on the judgment sum carries interest at the rate of 15% per annum contrary to O. 42, r. 12 of Rules of the High Court 1980 which prescribes the interest rate at 8% per annum from date of judgment until the judgment is satisfied.

Brief facts

AIW Sdn. Bhd., the first defendant in Suit No. KG. 13 of 1987 applied for various banking facilities from the creditor. The securities among others; furnished to secure the facilities are -

(i) two charges over a parcel of land known as Lot 864, s. 66 KTLD belonging to Syarikat Hock Kwong Furniture and Woodworking Factory Sdn. Bhd., a third party. Two memorandum of charges were executed *vide* nos. L5457/83 and L5843/83 (see exhibit GLH 2). The sum to be extended in various forms to AIW Sdn. Bhd. is RM2,750,000.
(ii) a letter of guarantee given by AIW Sdn. Bhd.'s directors, Encik Mohd. Salleh Arbi and Mr. Kho Kak Siew (the debtor) (see exhibit GLH 5).

AIW Sdn. Bhd. failed to maintain the facilities in a satisfactory status and accordingly foreclosure action *vide* originating summons No. 19 of 1985 (see exhibit GLH 3) was initiated to auction Lot 864. A suit was also commenced to enforce the letter of guarantee *vide* High Court No. KG. 13 of 1987.

At the time the receiving and adjudication order took effect, the foreclosure action was still pending. Judgment in default of appearance was entered against Mohd. Salleh Arbi on 19 December 1987 and by a Court Order dated 12 November 1988 (exhibit GLH 1) final judgment was entered against AIW Sdn. Bhd. and the debtor partially. In respect of the debtor *vide* GLH 1, the final judgment entered against him is for the sum of RM1,920,409.69 with interest thereon at the rate of 15% per annum from 24 November 1986 until full and final payment and costs and it was further ordered that the residue of the creditor's claim against the debtor in the sum of RM$1,889,449.82 representing the Term Loan Facility do proceed to trial.

In respect of the debtor, a bankruptcy action based on the portion of the Court order that gave final judgment to the plaintiff was commenced against him. By consent, he was adjudged a bankrupt when the conditional receiving and adjudication order took effect.

Ground (1):

At paragraph 12 of the debtor's affidavit affirmed on 12 October 1991, the debtor contends that he ought not to have been adjudged a bankrupt while the creditor is actively pursuing the foreclosure action. I am of the view that there is no basis for such a contention. The Supreme Court in *Bank Bumiputra Malaysia Bhd. v. Esah* [1985] 2 CLJ 409 laid to rest the contention that it is improper to commence a foreclosure action and at the same time enforce a guarantee.

The creditor having obtained final judgment against the debtor in High Court Suit No. KG. 13 of 1987 and there being no appeal on the said judgment and in the absence of a stay of execution order, the creditor is entitled to enforce the judgment to secure payment by execution proceedings or as the judgment debt exceeded RM2,000 to bankrupt the debtor as was done in this case. Therefore the debtor failed on this ground.

Ground (2):

The debtor alleged that the creditor's action is in violation of s. 5(2) of the Act. The debtor claimed that the creditor is a secured creditor and had failed to specify in the petition their willingness to give up the security in the event the debtor is adjudged a bankrupt or give an estimate of the security as required by s. 5(2) of the Act.

The creditor is not disputing that they did not in their petition specify that information but contended that they are under no legal obligation to do so as they claimed that they are outside the ambit of s. 5(2) of the Act.

Section 5(2) of the Act reads -

> If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.

In construing s. 5(2) of the Act we have to fall back on the definition of "secured creditor" as defined in s. 2 of the Act. According to s. 2, "secured creditor" means:

> a person holding a mortgage, charge, lien on the property of the debtor or any part thereof as security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment.

It is apparently clear, in my view, that the definition gives a restricted meaning to "secured creditor" and in no uncertain terms refers to "secured creditor" as a person holding a charge **on the property of the debtor as a security for a debt due to him from the debtor**. The two limbs in the definition are that the creditor is to hold property belonging to the debtor and the property held as a security is for the debt due to the creditor from the debtor. In the present case the creditor does not hold a charge on a property belonging to the debtor but instead the property belongs to Syarikat Hock Kwong Furniture and Woodworking Factory Sdn. Bhd., a third party (see exhibit GLH 2). In any event, the property is held as a security for the debt due to the creditor from AIW Sdn. Bhd. and not that of the debtor. The definition would therefore exclude a chargee holding a third party charge as in the present case (see *Rabindera Singh s/o Arjan Singh; ex-parte Malaysian International Merchant Bankers Bhd.* [1989] CLJ 858; *In re Perkins Ex-parte Mexican Santa Barbara Mining Co.* [1890] QB 613). Further, **Halsbury's Laws of England**, 2nd Edition, Volume 2, at p. 64 pertaining to definition of 'secured creditor' said -

> The mortgage or other charge, the holding of which constitutes a person a secured creditor, must be a mortgage or charge on the property of the debtor. A security on the property of a third person, even though it be for the same debt, does not constitute the holder a secured creditor.

It would seem clear, in my opinion, that the debtor is outside the purview of s. 5(2) read with s. 2 of the Act and the question of the creditor's action violating s. 5(2) of the Act

does not arise at all. The debtor therefore failed on this ground.

In respect of the additional ground relied on by the debtor's Counsel in his written submission, it is to be noted that the interest charged was in accordance to the judgment obtained (see GLH 1). There has been no appeal in respect of the said judgment. The bankruptcy notice was issued in accordance with the judgment obtained against the debtor. In any event, it is too late for the debtor to raise this issue now as he had not given notice to the creditor under s. 3(2)(ii) of the Act. The subsection reads -

> Provided that a bankruptcy notice -
>
> (i) ...
>
> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

Section 3(2)(ii) of the Act was considered by Chang Min Tat J. (as he then was) in *Re Arunachalam; Ex-parte Indian Overseas Bank Ltd.* [1968] 1 MLJ at p. 90 -

> On the authorities, it seems to me reasonably clear that where an excess is claimed in the bankruptcy notice and no such notice of dispute of the validity of the notice by reason of such excess is given, then the bankruptcy notice is not invalid merely by reason of the excess.

For the reasons set out by me this additional ground of the debtor is totally baseless and accordingly the debtor failed on this ground also.

In the circumstances, I dismissed the notice of motion of the debtor with costs. The debtor appealed against my said order.

SABDIN GHANI

v.

MUSA HAJI AMAN

HIGH COURT, KOTA KINABALU
DATO' SYED AHMAD IDID J.
[ORIGINATING SUMMONS NO. K.70 OF 1991]
16 DECEMBER 1992

ADMINISTRATIVE LAW: Withdrawal of appointment as Secretary-General - Whether there was breach of rules of natural justice - Whether there is provision in Constitution of society to withdraw appointment.

In November 1990, the President of the Dewan Perniagaan Bumiputra Sabah (Dewan) reappointed the plaintiff as its Secretary-General for the period 6 November 1990, to 30 October 1993 pursuant to Article 10 of the Dewan's Constitution. On 12 August 1991, the plaintiff was asked to voluntarily relinguish (or resign) his post as Secretary-General. On 22 August 1991, the President of the Dewan informed the plaintiff by letter that the Supreme Council of the Dewan had withdrawn the plaintiff's appointment pursuant to Article 11(5)(i) of the Dewan's Constitution with immediate effect.

The plaintiff contends that the withdrawal of his appointment as Secretary-General is invalid on two grounds:

(i) that it breaches the rules of natural justice; and
(ii) by Article 11(5)(i) of the Dewan's Constitution the Supreme Council can dismiss but not withdraw his appointment as Secretary-General of the Dewan.

Held:

[1] By the plaintiff's own account and by the minutes, it can be seen that the plaintiff gave a forceful account of himself at the meeting. Many will say that there is nothing more just than to be judged by one's peers. There is no denying that the Council were the plaintiff's peers. There is no evidence that the Council were biased or that the proceedings were not in the bona fide exercise of the powers of the Council. The plaintiff has not advanced any reason to prove that the members of the Council were biased or fraudulent or malicious.